Supreme Court, U.S.
FILED

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OFFICE OF THE CLERK

In the

SUPREME COURT OF THE UNITED STATES

October Term, 1995

ALLAN AND ALLAN ARTS, LTD.,

Petitioner,

vs.

GLORIA ROSENBLUM,

Respondent.

Petition for a Writ of Certiorari
To: Court of Appeals, State of New York

PETITION FOR A WRIT OF CERTIORARI AND APPENDIX

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QUESTIONS PRESENTED FOR REVIEW

The sole question presented for review is:

Did New York violate the First and Fourteenth Amendments by granting absolute privilege to a voluntary participant at a zoning board of appeals hearing, thus protecting her from liability for making malicious and false statements about the applicant?

PARTIES TO THE PROCEEDING

The parties to the proceeding are:

1. Allan and Allan Arts, Ltd., d/b/a Gateway Playhouse, Petitioner.

2. Gloria M. Rosenblum, Respondent.

3. Allan and Allan Arts, Ltd. is a New York State corporation with no parent companies and no nonwholly-owned subsidiaries.

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PETITION FOR WRIT OF CERTIORARI

OPINIONS BELOW

The opinion of the Court of Appeals of New York, entered on April 4, 1995, is reported at 85 N.Y.2d 921, 627 N.Y.S.2d 319, and is reprinted in the Appendix hereto at A1. The opinion of the Appellate Division, Second Department, of the New York State Supreme Court, entered on August 1, 1994, is reported at 201 A.D.2d 136, 615 N.Y.S.2d 410, and is reprinted in the Appendix hereto at A4.

GROUNDS OF JURISDICTION

The New York State Court of Appeals Order denying permission to appeal the August 1, 1994 Appellate Division Order was entered on April 4, 1995. This Petition for Writ of Certiorari was filed within ninety (90) days of the entry of

the Court of Appeals Order.

Jurisdiction is grounded on the fact that a federal question is involved: Did New York violate the First and Fourteenth Amendments by granting absolute privilege to a voluntary participant at a zoning board of appeals hearing, thus protecting her from liability for making malicious and false statements about the applicant?

This case is reviewable pursuant to U.S. Supreme Court Rules 10.1(b), in the the Court of Appeals and Appellate Division have "decided a federal question in a way that conflicts with the decision of another state court of last resort or of a United States court of appeals", and 10.1(c), in that the Court of Appeals and Appellate Division have "decided an important question of federal law which has not been, but should be settled by this Court..."

CONSTITUTIONAL PROVISIONS

"Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances." (U.S. Constit., Amend. I)

"All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." (U.S. Const., Amend. XIV, Sect. I)

STATEMENT OF CASE

THE ISSUE

The issue in this case is whether New York may grant absolute privilege to a voluntary participant at a zoning board of appeals hearing, thus protecting her from liability for making malicious and false statements about the applicant.

The appellants believe that New York's action violates the First and Fourteenth Amendments.

FACTUAL HISTORY

For approximately 45 years, a small, family-run playhouse in the Village of Bellport, on the south shore of Long Island, has presented professional musical theater performances during the summer months. The playhouse is situated in a rustic setting, on slightly more than seven acres of property. Over the years, homes were built in the area, and it is

zoned for residential development.

One of the persons who chose to purchase a home adjacent to the playhouse property is the defendant in this case: Gloria M. Rosenblum. For a number of years, she and her husband enjoyed a cordial relationship with the owners of the playhouse, Stanley and Ruth Allan. The Allans operate the playhouse under the name, Allan and Allan Arts, Ltd., which is a New York corporation and the plaintiff in this case.

For reasons that remain unclear, the relationship between the Allans and Mrs. Rosenblum apparently deteriorated. Mrs. Rosenblum began to complain to municipal officials about purported health, safety and other code violations at the playhouse. She also endeavored to persuade editors and reporters at Newsday, the regional daily newspaper, to write a

story about the alleged violations--a matter of which the writer of this brief has personal knowledge in that she was one of those reporters.

Then, in June, 1989, the playhouse applied to the Bellport Village Board of Zoning Appeals for permission to park tractor-trailer trucks on the property, near the main theater building, to transport scenery to and from other locations, and for permission to place a parking lot for physically disabled patrons in a location where it would be most convenient for those patrons.

At a public hearing on the application, held on June 22, 1989, Mrs. Rosenblum offered voluntary testimony in vehement opposition to the application, stating, in part, that headlights from the vehicles of the disabled patrons would shine through her livingroom window. She

also made statements about the operation of the playhouse that she knew and/or should have known were false, and submitted a written text of her comments to the board, to be included as part of the record.

The Allans believed that Mrs. Rosenblum was motivated by malice and a desire to force them to downsize their business or move it to another location. After being granted only part of the relief sought at the hearing, they sued Mrs. Rosenblum for defamation in the New York State Supreme Court, contending that she acted with malice in that she knew that her comments at the hearing were false, or that she, with malice, acted with intentional and reckless disregard for the truth.

That action was commenced on behalf of the Allans by the New York corporation

that operates the playhouse: Allan and Allan Arts, Ltd.. It was commenced by service of a Summons and Complaint on March 26, 1990.

Mrs. Rosenblum, who is a self-employed attorney with a general practice, appeared pro se, and moved to dismiss the suit, contending that her comments were protected by the doctrine of absolute privilege because zoning board of appeals hearings are quasi-judicial. The playhouse argued that Mrs. Rosenblum's comments were protected only by a qualified privilege. The Notice of Motion to Dismiss was served on April 16, 1990. The New York State Supreme Court agreed and dismissed the complaint. The order of dismissal was entered in the Office of the Suffolk County, New York, Clerk on February 13, 1991.

The playhouse filed a timely appeal

of that decision. On August 1, 1994, the Appellate Division of the New York State Supreme Court sustained the lower court's decision. The playhouse filed a timely motion seeking leave to appeal to the Court of Appeals. That motion was denied by the Appellate Division on November 14, 1994.

The playhouse then filed a timely motion with the Court of Appeals, seeking permission from that court to appeal. That motion was denied by the Court of Appeals in a decision dated April 4, 1995.

The operators of the playhouse now seek to have this matter heard by the United State Supreme Court. The case involves a First Amendment issue that was first raised at the lower court level, and a Fourteenth Amendment issue was raised as the result of the court's decisions at the lower and appellate levels.

ARGUMENT

POINT I

NEW YORK VIOLATED THE EQUAL PROTECTION CLAUSE OF THE FOURTEENTH AMENDMENT

It is well settled that the states are permitted broad discretion to make classifications for the purpose of enacting laws to further legitimate state interests. The power may not be exercised arbitrarily and must have some rational basis. It is, however, limited by constitutional rights.

To constitute a denial of equal protection, there must be a purposeful discrimination designed to favor one individual or class over another individual or class, with no rational basis for the differentiation between them.

In order to apply the traditional

test for denial of equal protection under state law, the court must first ascertain both the basis of the classification and the governmental objective purportedly advanced by the classification. The classification must be compared to the governmental objective to determine whether the classification rests on some ground of difference having a rational relationship to a legitimate state interest.

The principal of equal protection does not prohibit the state from treating different classes of persons in different ways, provided the statutory classification rests on a reasonable rather than an arbitrary basis and is founded on a difference that bears a fair and reasonable relationship to the purpose of the statute in order that all persons similarly situated are treated in the same

way.

Any classification, to be lawful, must, as a bare minimum, have a rational basis. It can be justified if is rationally related to further legitimate objectives.

POINT II

NEW YORK FAILED TO APPLY THE STRICT SCRUTINY TEST

When a classification of persons is deprived of a fundamental Constitutional right in order to further a state interest, a "strict scrutiny" test must be applied. That is, the classification must necessarily be related to a compelling state interest. This test requires a much higher standard in that the classification must not just be rationally related, but also necessarily related to the state interest. And that interest must not simply be legitimate; it must be

compelling. Further, this test requires that the state draw the class lines as narrowly as possible to include only those persons whose inclusion is necessary to promote the compelling state interest.

Composition of the Class

The New York courts have discriminated against the appellants by placing them in a class of persons who are to be denied equal protection of a first amendment right as a result of their application to a zoning board of appeals for a variance from municipal zoning regulations.

Legitimate State Purpose

The Appellate Division of the New York State Supreme Court has articulated a legitimate state purpose in this case: the safeguarding of the right of citizens to freely participate in the public process without the fear of being harassed,

intimidated or punished with "SLAPP" suits--meritless lawsuits seeking large damages, often filed by wealthy developers against individuals who do not have substantial assets to hire counsel to defend them. The purported purpose of these lawsuits is to seek redress for defamation. The actual purpose of such lawsuits is to silence the opponents--that is, to stop them from exercising their right of free speech.

The applicants believe that protecting the public's right to free speech is a compelling state interest. And so, too, is the right of citizens to freely participate in the public process without the fear of being harassed, intimidated or punished with costly and baseless litigation by those who seek to silence them. However, New York's SLAPP law (Sections 70a and 76a of the Civil

Rights Law) contain a remedy: a provision allowing a plaintiff to recover damages in cases where clear and convincing evidence establishes that the speaker acted with knowledge of the falsity of her statement or with reckless disregard of whether it was false. Thus, contrary to the implication given by the Appellate Division's decision, New York's SLAPP suit law does not grant absolute privilege to those who choose to participate in the public process.

(See also the law's Executive Message stating that purpose of the "SLAPP" suits is to "slap" or punish individuals unfamiliar with legal proceedings. However, this case involves an attorney who is a seasoned litigator and was not only familiar with legal proceedings but who was cavalier about her defamatory comments because she believed that she

enjoyed absolute privilege from suit for defamation. Indeed, she had prepared her comments in advance and offered a written version of them into the record.)

Thus, giving absolute privilege to voluntary participants at a zoning board of appeals hearing (i.e. by depriving applicants of their First Amendment Right to protect themselves against those who maliciously state falsities about them to a zoning board of appeals) does not have a necessary relationship to the state's legitimate interest in preventing SLAPP suits or to the state's compelling interest in encouraging free speech and the citizens participation in public matters.

Applying the strict scrutiny test, there is no necessary relationship between denying protection against malicious defamation to this class of persons and

the legitimate state interest of curbing SLAPP suits or the compelling interest of furthering the free exchange of ideas concerning public matters.

Thus, this class of persons--applicants for variances--should receive the same protection in this regard as members of the general public who might be maliciously defamed. There is no need for the creation of this separate class and the resulting discrimination against them.

POINT III

IT IS NOT NECESSARY TO GRANT ABSOLUTE PRIVILEGE TO FURTHER THE COMPELLING STATE INTEREST

The Appellate Division has stated that to accomplish its goal of protecting innocent members of the public from SLAPP suits, it must grant absolute privilege to all statements made by voluntary participants at hearings held by zoning boards of appeal, as long as those

statements are pertinent to the application before the board. That is, the court ruled that applicants do not have the right to sue a speaker for defamation even if statements made about the applicant are false and intentionally malicious.

Unfortunately, depriving applicants of their right to redress from defamation has no rational relationship to, and is not necessary to, protect individuals from SLAPP suits. In attempting to protect individuals from SLAPP suits, the state has unnecessarily formed a class of persons that is overly broad and discriminated unnecessarily. The state was well aware that there was a means of accomplishing its legitimate goal without discrimination, yet it chose not to select this option for no rational reason. That is, the state was well aware that it could

have accomplished its goal by ruling that statements made by voluntary participants at zoning board of appeals hearings are protected by a qualified privilege rather than an absolute one. This would have resulted in equal protection of all persons--applicants and opponents alike. With a qualified privilege, and laws against SLAPP suits, opponents would feel free to speak their minds without fear of baseless retribution. Applicants, on the other hand, would have the right to sue for defamation if they were truly wronged--that is, if their opponents intentionally made malicious and false statements that damaged their reputations and/or their business.

The New York courts have not articulated a necessary reason for forming an overly broad classification of zoning board applicants that includes both those

who genuinely seek redress from the harms caused by persons who intentionally and maliciously make false statements about them, and those applicants who pretend to have been defamed so that they may manipulate the legal system for the sole purpose of bullying their outspoken opponents into submission.

Thus, the issue is whether depriving applicants of their right not to be defamed is necessary to achieve a compelling state interest: the protection of the public's right to speak freely in matters of public interest. The applicants contend that such a deprivation is not necessary. There is a less onerous method of safeguarding the public's right to speak freely, a method that would not deprive applicants of their First Amendment right not to be defamed and that would not deprive the applicants of their

right to equal protection under the Fourteenth Amendment. By applying a qualified privilege, rather than an absolute one, the interests of these two groups would be balanced: those voluntary participants who speak without malice will be protected, as will those applicants who have been maliciously defamed.

Zoning Board Hearings Distinguished From Court Proceedings

Although freedom of speech is basic to a free and dynamic society, states have a duty to prevent encroachment on more important, or equally important, interests. The constitutional guarantee of free speech was never intended as a license for illegality or immorality. The privilege of free speech does not confer upon one individual the right to use that privilege for the purpose of maliciously injuring another. The exercise

of the right of free speech demands and even mandates the observance of the co-equal duty not to abuse the right, but to utilize it with reason and dignity. That is, freedom of speech is not absolute and may be limited when the appropriate occasion arises.

Restatement, 2d, Torts § 588 states:

> "A witness is absolutely privileged to publish defamatory matter concerning another in communications preliminary to a proposed judicial proceeding or as part of a judicial proceeding in which he is testifying, if it has some relation to the proceeding.

Restatement, 2d, Torts at § 588, comment a explains the rationale behind the grant of this privilege to a judicial proceeding, including the built-in safeguards to control abuses of the privilege:

> "The function of witnesses is of fundamental importance in the administration of justice. The final judgment of the tribunal

> must be based upon the facts as shown by their testimony, and it is necessary therefore that a full disclosure not be hampered by fear of private suits for defamation. The compulsory attendance of all witnesses in judicial proceedings makes the protection thus accorded the more necessary. The witness is subject to the control of the trial judge in the exercise of the privilege. For abuse of it, he may be subject to criminal prosecution for perjury and to punishment for contempt."

In Mills v. Denny, 1954, 245 Iowa 584, 63 N.W.2d 222, involving an allegedly slanderous statement made by a mayor during a city council meeting, the court similarly discussed the rationale behind the doctrine of absolute privilege as well as the scope to which that privilege should be confined:

> "The doctrine of privileged communication is based upon the principle of good public policy. This is especially true with the cases of absolute privilege, where the interests and the necessities of society require

that on certain occasions, utterances or publications of individuals, even though they are not false and maliciously made, shall protect the defamer from all liability to prosecution...

"Absolute immunity, it seems, should be confined to cases where there is supervision and control by other authorities, such as courts of justice, where proceedings are under the able and controlling influence of a learned judge, who may reprimand, fine and punish as well as expunge from records statements of those who exceed proper bounds, and who may themselves be disciplined when necessary. The same is true in federal and state legislatures, and their committees, where the decorum is under the watchful eye of presiding officers and records may be stricken and the offending member punished. If this is not done, the day may come when the courts will no longer recognize and grant absolute immunity even in this field, for then the evil will overshadow the good and will not aid the public welfare...

"Underlying the doctrine of absolute immunity is the concept of an alternate if not adequate remedy. Extension to fields where no safeguards or remedies

> are found has been uniformly refused by the courts and justly so, for absolute immunity presents a conflict between two American principles equally regarded in law, i.e., the right of an individual on one hand to enjoy his reputation unimpaired by defamation attacks, and on the other hand the necessity in the public interest of a free and full disclosure of facts in the conduct of the legislative, executive and judicial departments."

The law of absolute privilege will be extended to administrative proceedings conducted in a manner with safeguards similar to a judicial proceeding. See 3 Restatement, Torts, pp. 585-590; Engelmohr v. Bache, Washington, 401 P.2d 346 (1965); Rainier's Dairies v. Raritan Valley Farms, 19 N.J. 552, 562, 117 A.2d 889, 894 (1955).

The Voluntary Participant versus The Compulsory Witnesses

A voluntary participant must be distinguished from a compulsory witness.

See Andrews v. Gardiner, 224 N.Y. 440, 121 N.E. 341 (1918); Wright v. Lathrop, 149 Mass. 385, 21 N.E. 963 (1889), in which a person who enjoys the right of all citizens to participate in matters of interest or importance to him is distinguished from those persons who are compelled by the courts to testify. That is, the courts have distinguished between two types of witnesses: those who freely and voluntarily choose to exercise their right to speak and those who are required by others to testify--i.e. those who are required to perform a duty. Absolute privilege has been granted only to the latter.

Zoning Board Hearings Distinguished From Other Quasi-Judicial Proceedings

In 12 NY Jur 2d, Buildings § 318, it is clearly stated that:

> "The rule of absolute privilege, as respects the law of defamation, which obtains in court proceedings, does not apply to hearings before a zoning board of appeals."

This is most likely based on the only New York case that had addressed this issue: Klish v. Goldman, 117 N.Y.S. 2d 867, (1952), in which the court ruled that statements made at a board of zoning appeals hearing were not protected by an absolute privilege because the board of appeals is an administrative body and its hearings are not sufficiently akin to court proceedings to be judicial in nature.

In Supry v. Bolduc, 112 N.H. 274, 293 A.2d 770 (1972), the Supreme Court of New Hampshire held that statements made before a zoning board in a hearing for a variance were entitled to a conditional (qualified) privilege. This case is sufficiently

analogous to the appellant's case to bear some discussion here. In the New Hampshire case, as with the appellant's case, the owner of adjoining property appeared at the hearing and spoke in opposition to the petition. The plaintiff commenced a lawsuit, alleging that the neighbor had slandered him at the hearing. The defendant filed a motion to dismiss, claiming that her remarks were made during a judicial or quasi-judicial proceeding and were therefore absolutely privileged. The court held that boards of adjustment, zoning appeals or review and the like are "administrative, discretionary , fact-finding bodies and agencies" and they may exercise quasi-judicial functions, powers and authority as concomitant to their delegated authority. The court, however, continued:

"Still, many elements of a true

> judicial proceeding which affords safeguards to the participants therein are not made a part of the required procedure at hearings held before such boards and commissions."

The New Hampshire court noted that an adjoining landowner at such a proceeding does deserve some level of protection--a conditional (qualified) privilege--because she not only has a private interest in the protection of her property to advance, but she also furthers the recognized public interest in encouraging open discussion of zoning matters at public hearings.

Split of Authority

In advancing the public policy protected by the grant of absolute privilege, the courts appear to be split over the question of whether administrative boards are "quasi-judicial" bodies--or possessing a hearing process

that is sufficiently similar to courts--for the purpose of absolute privilege.

In Sweet v. Middlesex Mutual Insurance Company, 397 F.Supp. 1101 (1975), The United State District Court in New Hampshire held that alleged misrepresentations made to the New Hampshire Department of Insurance were absolutely privileged. The court distinguished the case from Supry v. Bolduc, supra, in which the court held that:

> "many of the elements of a true judicial proceeding which afford[s] safeguards to the participants therein are not made a part of the required procedure...and that the public interest in such hearings was not great enough to permit absolute privilege."

In Sweet, the court stated unlike a zoning board hearing, a hearing before the Department of Insurance

> "embodies many of the safeguards

> of recognized judicial proceedings. The parties have, for example, statutory rights to an attorney, to inspect all evidence and to have subpoenas issued for witnesses and documents."

Additionally, the court noted, a witness risks contempt citations for improper behavior.

Appellants also note that one of these safeguards is an oath, which was not administered in the case on appeal herein.

There appears to be a split of authority as to whether administrative boards are "quasi-judicial" bodies and, thus, whether statements made before them are absolutely privileged.

One of the most comprehensive discussions of the test that should be applied is contained in Melton v. Slonsky, 1973, 504 P.2d 1288, in which the Court of Appeals of Arizona was asked to determine whether the Arizona State Liquor Board was

"quasi-judicial" and, therefore, whether statements made before it were absolutely privileged. In deciding that the statements were protected by only a qualified privilege, the court cites cased involving a state banking board, the federal radio commission, a state insurance commissioner, the director of milk industry, the state board of embalmers, a state comptroller, the state revenue commission, and the state insurance commission, and said:

> "The difference in the results evidenced by the above cases stems not only from a statutory difference in the powers and procedures of the various administrative bodies involved, but also, in our opinion, from a judicial determination of which of two conflicting public policies shall prevail. That is, giving recognition to the policy 'that persons should speak freely and fearlessly in litigation, 'uninfluenced by the possibility of being brought to account in an action for defamation'," Stewart v. Fahey,

14 Ariz.App. 149, 150-151, 481 P.2d 519, 520-521 (1971), and a policy against extending this rule to administrative bodies where a volunteer informer may '[vent] his malice under the guise of protecting the public.' Meyer v. Parr, supra. In our opinion, both policies can best be served not by granting or denying an absolute privilege based upon the mere determination of whether a particular administrative board possesses 'quasi-judicial' powers, but by extending a qualified or defeasible privilege to statements made before such boards. Such a qualified privilege was recognized at common law as the 'public interest' privilege and 'involves communications made to those who may be expected to take official action of some kind for the protection of some interest of the public.' W.L.Prosser, Law of Torts, § 115, at 791 (4th ed. 1971). By granting a defeasible privilege to the communication made before an administrative body, the right of individuals to express freely their views at hearings upon the subject under consideration is protected, while at the same time such hearings are prevented from becoming a forum for unfettered character assignation. Implicit in making the privilege

> qualified is the qualification that the privilege will be forfeited if irrelevant defamatory matter which has no bearing on the matter under consideration is indulged in, Lathrop v. Sundberg, 55 Wash. 144, 104 P. 176 (1909), or if publication is made to any person other than those whose hearing of it is reasonably for furtherance of the public interest. Vail v. Pennsylvania R. Co., 103 N.J.L. 213, 136 A. 425 (1927). Moreover, the qualified privilege is lost if the publication is not made primarily for the purpose of furthering the public interest which is entitled to protection. Restatement of Torts, supra, § 603, Purpose of Particular Privilege. This is generally referred to as 'with malice'."

In view of the above, it appears that it was not "necessary" for New York to grant an absolute privilege to statements made by a voluntary partitipant in a zoning board of appeals hearing because a qualified privilege would have accomplished the purpose for which the absolute privilege was intended--to

protect speakers from fear of speaking their minds and also encouraging the citizenry to participate in matter sof public interest--while at the same time not discriminating against an applicant. Thus, New York's action was not "necessary" to further a "compelling" state interest.

CONCLUSION

New York has failed to prove a "necessary" relationship between its discriminatory action and any "compelling" state interest. Therefore, the court's ruling must be overturned.

Dated: Water Mill, New York
July 3, 1995

Respectfully submitted,

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STATE OF NEW YORK
COURT OF APPEALS

Donald M. Theraw
Clerk of the Court

Clerk's Office
Albany, New
York 12207

DECISION April 4, 1995

2-10 Mo. No. 110	Motion for leave
Allan & Allan Arts,	to appeal denied.
Ltd., &c.,	Cross motion for
Appellant,	leave to appeal
v.	and for the
Gloria M. Rosenblum,	imposition of
Respondent.	sanctions
	denied.

A1

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND
JUDICIAL DEPARTMENT

6530L
Y/em

LAWRENCE J. BRACKEN, J.P.
VINCENT R. BALLETTA, JR.
JOHN COPERTINO
FRED T. SANTUCCI, JJ.

91-05784

Allan and Allan Arts, Ltd., etc., appellant, v Gloria M. Rosenblum, respondent.

DECISION & ORDER ON MOTION

Motion by the appellant for reargument of an appeal from an order of the Supreme Court, Suffolk County, entered February 13, 1991, which was determined by opinion and order of this court dated August 1, 1994, or, in the alternative, for leave to appeal to the Court of Appeals from the decision and order of this court. Cross motion by the respondent for reargument of

the denial of sanctions, and/or for the imposition of sanctions, and/or for leave to appeal the denial of sanctions to the Court of Appeals.

Upon the papers filed in support of the motion and cross motion and the papers filed in opposition thereto, it is

ORDERED that the motion and cross motion are denied, without costs or disbursements.

BRACKEN, J.P., BALLETTA, COPERTINO and SANTUCCI, JJ., concur.

ENTER:

Martin H. Brownstein

Clerk

November 14, 1994

ALLAN & ALLAN ARTS, LTD. v ROSENBLUM

SUPREME COURT OF THE STATE OF NEW YORK
APPELLATE DIVISION : SECOND
JUDICIAL DEPARTMENT

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Z/hu

AD2d

LAWRENCE J. BRACKEN, J.P.
VINCENT R. BALLETTA, JR.
JOHN COPERTINO
FRED T. SANTUCCI, JJ.

91-05784

Allan and Allan Arts Ltd., d/b/a Gateway Playhouse, appellant, v Gloria M. Rosenblum, respondent.

OPINION & ORDER

APPEAL by the plaintiff, in an action to recover damages for defamation, from an order of the Supreme Court (Lester E. Gerald, J.) entered February 13, 1991, in Suffolk County, which granted the defendant's motion to dismiss the plaintiff's complaint.

A4

Nowak & Pope, Water Mill, N.Y. (Ann L. Nowak of counsel), for appellant.

Gloria May Rosenblum, East Islip, N.Y. (Kenneth Rosenblum of counsel), respondent pro se

BALLETTA, J. The plaintiff brought the instant action to recover damages for slander and libel based on statements made by the defendant at a hearing before the Village of Bellport Zoning Board of Appeals (hereinafter the Board), which statements related to the plaintiff's application for a use variance for its property located adjacent to the defendant's property. The Supreme Court, Suffolk County, held that the defendant's statements were covered by an absolute privilege and dismissed the complaint pursuant to CPLR 3211(a)(7) for failure to state a cause of action. The question that must be resolved, therefore, is whether an

absolute privilege should attach to relevant statements made by an adjoining landowner at a public hearing conducted by a village zoning board of appeals on an application for a variance. We agree with the Supreme Court, Suffolk County, that an absolute privilege attaches to such statements and, therefore, affirm.

The plaintiff, a regional playhouse, is located in the Village of Bellport in an area zoned Residence B, and has operated a summer theatre on the subject premises since the 1940's. The defendant has owned the property abutting the plaintiff's eastern boundary for 16 years.

In April 1989 the plaintiff applied to the board, seeking a variance for the outdoor storage of tractor trailers and for a handicapped parking lot on the southeast corner of its property. In June 22, 1989,

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the Board held a public hearing of the plaintiff's application. A court stenographer was present at the hearing, at the plaintiff's request, and recorded the proceedings, a transcript of which was thereafter provided to the Board pursuant to an agreement between the Board and the plaintiff.

At the hearing, the defendant made various oral statements in opposition to the plaintiff's application, limiting her remarks primarily to the plaintiff's proposed handicapped parking in the southeast corner of the parcel. While the defendant did not object to the use of a portion of the plaintiff's property for handicapped parking, she objected to its location adjacent to her property, asserting that the proposed location was unsuitable

for handicapped purposes, and that the headlights from the vehicles would shine into her living room. During her oral presentation, the defendant also made numerous allegations concerning the plaintiff's use of the property. In particular, she claimed that the plaintiff's past and present use of the southeast portion of its property for parking was illegal, that the plaintiff's current request for a variance designating the area for handicapped parking was a "cynical manipulation * * * to legalize its long term conduct", and that the plaintiff had "continued to violate the law, maintain the illegal storage, parking, noise and illegal year-round activity, despite years of warning."

In its complaint, the plaintiff alleged that the defendant's oral statements made at

the hearing were not only slanderous but that they were also libelous because they were recorded and published by the court stenographer. The defendant moved to dismiss the complaint on the ground that her statements before the Board were protected by an absolute privilege. The Supreme Court, Suffolk County, granted the motion and dismissed the complaint, ruling that the zoning board was a quasi-judicial body, and, therefore, statements made before that body were absolutely privileged; the court further held that, as the adjacent landowner, the defendant enjoyed sufficient status to entitle her to the privilege. We agree.

It has long been settled "that a counsel or party conducting judicial proceedings is privileged in respect to words or writings used in the course of such

proceedings reflecting injuriously upon others, when such words and writings are material and pertinent to the questions involved; and that, within such limit, the protection in complete, irrespective of the motive with which they are used" (see, Marsh v Ellsworth, 50 NY 309, 311-322; see also, Fowler v Conforti, 194 AD2d 394; Hammer v Berg, 193 AD2d 716; Grasso v Matthew, 164 AD2d 475). The same rule applies with equal force to the statements made by witnesses in a judicial proceeding (see, Andrews v Gardiner, 224 NY 440, 446)>

The rationale for the according of an absolute privilege to such statements is that:

> "'The interest of society requires that whenever [persons] seek the aid of courts of justice, either to assert or to defend rights of person, property, [or[liberty, speech and writing therein must be

untrammelled and free. The good of all must prevail over the incidental harm to the individual. So the law offers a shield to the one who in legal proceedings publishes a libel, not because if [persons] were afraid to set forth their rights in legal proceedings for relieve of liability to libel suits, greater harm would result, in suppression of the truth. The law gives to all who take part in judicial proceeding, judge, attorney, counsel, printer, witness, litigant, a right to speak and to write, subject only to one limitation, that what is said or written bears upon the subject of litigation' (1 Seelman, The Law of Libel and Slander in the State of New York [rev ed], par 191, at 233)" (see, Park Knoll Assoc. v Schmidt, 89 AD2d 164, 170, revd on other grounds 59 NY2d 205; see also, Liberman v Gelstein, 80 NY 2d 429; Karam v First Am.

Bank of N.Y., 190 AD2d 1017; Marsh v Ellsworth, supra, at 312).

Moreover, the grant of absolute immunity which attaches to statements made in the course of judicial proceedings applies not only to proceeding before a court but also to proceeding "before tribunals having attributes similar to those of courts" (see, Andrews v Gardiner, supra, at 446). The evolution of the application of absolute privilege to quasi-judicial proceedings was described by this court in the case of Julien J. Studley, Inc. v Lefrak (50 AD2d 162, 165, Affd 41 NY2d 881):

> "We acknowledge that the rule of qualified privilege has been a traditional point of departure in the analysis of defamation suits vis-a-vis administrative proceedings. Over 40 years ago this court specifically held the rule applicable to a license revocation proceeding similar to that involved herein. (Leganowicz v Rone, 240 App Div 731). Since

A12

> that time, however, the complexities of our modern society have substantially broadened the role of administrative law both in its rule making and adjudicative aspects. With that expansion has come a concomitant recognition by many courts that certain attributes of the judicial process have equal relevance to those administrative bodies that utilize a quasi-judicial process in the determination of individual rights, privileges or obligations."

Accordingly, during the past several decades, the courts have extended the absolute privilege to a wide array of hearing held by administrative agencies, finding such hearing to be "in substance judicial" (see, Andrews v Gardiner, supra, at 447). Examples include Hertzfeld & Stern v Beck (175 AD2d 689 [the New York Stock Exchange's Department of Enforcement acted as a quasi-judicial body when it inquired into whether a member or its employee would

be disciplined]), Stilsing Elec., Inc v Joyce (113 AD2d 353 [proceedings held before an administrative agency of the New York State Department of Labor investigating the defendant's complaint concerning the plaintiff's apprenticeship program were quasi-judicial]), Lipton v Friedman (2 Misc 2d 165 [Workers' Compensation Board hearing which passes upon claims of injured workers brought against their employers was deemed quasi-judicial because of the hearing's adversarial nature, since the Referee's decision applied the law to the facts, and was subject to appellate review]), Kirchner v State of New York (82 Misc 2d 858 [unemployment insurance benefits hearing constituted quasi-judicial proceeding because the issue was determined by an adversarial proceeding, appropriate provisions of law were applied to the facts

and the decision was subject to appellate review]), and Julien J. Studley, Inc. v Lefrak (supra, at 162 [a complaint filed with the agency that licenses real estate brokers concerning a license revocation proceeding]).

Turning now to the instant case involving statements made at a public hearing held by a zoning board of appeals on an application for a variance, it should be noted that the quasi-judicial character of a zoning board of appeals was addressed by this court in Orange County Pub. Div. of Ottaway Newspapers v Council of City of Newbourgh (60 AD2d 409, affd 45 NY2d 947), wherein it was held that the deliberative proceedings of a zoning board regarding a variance application were quasi-judicial (see, Matter of Orange County Publ, v Newbourgh, supra, at 418; see also, 12 NY

Jur 2d Buildings 319). Similarly, in Matter of Moundroukas v Foley (99 AD2d 784), this court affirmed the dismissal of a suit for monetary damages against the members of the Greenburgh Zoning Board of Appeals for denying an application for a variance, finding that the Board's determination was "discretionary and quasi-judicial in nature", this immunizing the members of the Board from suit (see, Moundroukas v Foley, supra, at 784; see also, Jensen v Zoning Board of Appeals of the Vil. of Old Westbury 130 AD2d 549 [principles of res judicata and collateral estoppel apply to the quasi-judicial determinations of the zoning board of appeals]; Matter of Freddolino v Village of Warwick Zoning Bd. of Appeals, 192 AD2d 839 [same]). Significantly, the Court of Appeals has expressly stated that "a zoning board of appeals performs a quasi-judicial

function when considering applications for variances and special exceptions" (see, Matter of Knoght v Amelkin, 68 NY2d 975, 977).

Moreover, in Park Knoll Assoc. v Schmitt (supra, at 171), this court set forth the following guidelines for determining whether an administrative proceeding constitutes a quasi-judicial proceeding in which pertinent statements are afforded an absolute privilege:

> "The shield of absolute immunity extends to proceedings of administrative agencies where such proceedings are adversarial, result in a determination based upon the application of appropriate provisions in the law to the facts and which are susceptible to judicial review * * * Further, we note that in deciding whether the communication under review should be afforded an absolute privilege, our inquiry must not only consider the particular characteristics of the proceeding

in which they were made, it must also focus upon the particular policy considerations attendant upon such grant" (accord, Hertzfeld & Stern v Beck, 175 AD2d 689, supra; Stilsing Elec., Inc. v Joyce, 113 AD2d 353, 356, supra; see also, Kitchner v State, 82 Misc 2d 858, supra; Lipton v Friedman, 2 Misc 2d 165, supra).

It cannot be disputed that the proceedings in question before the Board on the plaintiff's application for a variance were adversarial in nature. An adversarial proceedings is one which is contested (see, Ballentine's Law Dictionary, at 40 [3d ed 1969]), and there is no doubt that the plaintiff's application was contested. In particular, it was the defendant who objected to the granting of variances at the hearing.

In order to make a decision to grant the variances requested by the plaintiff, the Board, of necessity, had to apply the

relevant law to the fact before it. Specifically, the Board needed to be familiar with the various zoning law to the facts before it. Specifically, the Board needed to be familiar with the various zoning laws and ordinances governing the subject property and the legal principles for granting or denying variances as well s the particular fact brought forward by the plaintiff and the surrounding neighbors, including the defendant. Additionally, the Board was required to make findings which were supported by the evidence in the record (see, Anderson, New York Zoning Law and Practice, 25.01, at 319; 25.31, at 352 [3d ed. 1984] ["The board of zoning appeals is an administrative body of limited jurisdiction. Its authority may be exercised only within bounds prescribed by statute or ordinance, and it may act only

after the basis for an action has been established by evidence adduced at a public hearing"]).

Finally, the determination of the Board was subject to judicial review pursuant to CPLR article 78:

> "Actions of the board of zoning appeals are subject to review by the courts, to determine whether the board acted within the limits of its jurisdiction, whether the standards imposed by statute and ordinance were respected, whether the procedural rights of the litigants were observed, and whether the board was chargeable with any abuse of discretion. In short, it is the task of the courts to police the boards" (Anderson, New York Zoning Law and Practice, 25.31 at 352 [3d ed 1984]).

Accordingly, under the guidelines as set forth by Park Knoll, it becomes apparent that hearings before a board of zoning appeals which are adversarial in nature, result in an application of relevant law to

the facts and are subject to judicial review.

Since the proceedings of the zoning board of appeals in this case were quasi-judicial in nature, it follows that an absolute privilege should attach to those statements made during the course of the proceedings and which were material and relevant to the proceedings. (see, Park Knoll Assocs. v Schmidt, supra; Tker v Pollak, 44 NY2d 211; Herzfeld & Stern v Beck, 175 AD2d 689, supra; Kitchner v State, 82 Misc 2d 858, supra).

The principal authority cited by the appellant for his arguments that the Board is not a quasi-judicial body, Ellish v Goldman (117 NYS2d 867), is not persuasive. Although the court in Ellish recognized the general rule that anything a witness says in a court of other tribunal having the

attributes of a court is absolutely privileged, it concluded that a zoning board was not sufficiently judicial in character as to warrant or deserve the benefit of absolute privilege as an inducement to witnesses to appear before it. However, the Ellish decision is at odds with the reasoning of the cases which have since applied the absolute privilege to proceedings before various administrative boards, and of the cases which have since held that a zoning board of appeals performs a quasi-judicial function when considering an application for a variance. Therefore, it is highly questionable whether the Ellish decision is still good law.

Although the defendant herein was not considered a party to the proceedings on the variance application (see, Ottinger v Arenal Realty co., 257 NY 371; Siegel v Lassiter,

6 AD2d 879; 12 NY Jur2d, Buildings, 316), she clearly had a role in the proceedings as a witness with respect to the application. As an adjacent landowner, not only did the defendant have an obvious interest in the proceedings, but she also clearly fell within the class of persons entitled to judicial review of a zoning board's determination (see, CPLR 7802[d]) or to intervene in any proceeding pursuant to CPLR article 78 initiated by a disappointed applicant (see, matter of Allan v McChesney, 194 AD2d 785). Moreover, the defendant's statements were material and pertinent because they related to the issues before the zoning board (see, e.g., Grasso v Matthew, 164 AD2d 476, 479, supra ["In the conduct of a legal proceeding, statements by parties and their attorneys are absolutely privileged if, by any view or under any

circumstances, they are pertinent to the litigation * * * No action for defamation exists unless the statement is so obviously impertinent as not to admit discussion of pertinence and so needlessly defamatory as to warrant the inference of express malice and a motivation solely to defame * * * The absolute privilege embraces anything that may possibly or plausibly be relevant or pertinent, with the barest rationality, divorced from any palpable or pragmatic degree of probability * * * This test of pertinency is extremely liberal"]). Thus, her statements are protected by an absolute privilege, notwithstanding the plaintiff's claim that here participation and testimony were voluntary.

Furthermore, by affording an absolute privilege to material and pertinent statements made by the participants in

proceedings before a zoning board of appeals proceeding, were are also advancing the important public policy of encouraging the active participation of the citizenry in issues affecting the welfare of the community. It should be noted in this regard that, effective January 1, 1993, a new section 70-a and 76-a of the Civil Rights Law serve to protect a citizen who is subjected to a SLAPP ("Strategic Lawsuits Against Public Participation") suit arising out of his or her exercising his or her right of public petition and/or participation. The legislative findings and purpose, as states in the law, are:

> "The legislature hereby declares it to be the policy of the state that the rights of citizens to participate freely on the public process must be safeguarded with great diligence. The laws of the state must provide the utmost protection for the free exercise of speech, petition and

> association rights, particularly where such rights are exercised in a public forum with respect to issues of public concern.
>
> "The legislature further finds that the threat of personal damages and litigation costs can be and has been used as a means of harassing, intimidating or punishing individuals, unincorporated associations, not-for-profit corporations and others who have involved themselves in public affairs" (L 1992, ch 767, 1); see also. Entertainment Partners Group, Inc, v Davis, 198 AD2d 63 ["We note also that New York State public policy strongly disfavors SLAPP suits designed to chill the exercise of a citizen's right to petition the government or appropriate administrative agency for redress of a perceived wrong"]).

However, although we are affirming the order dismissing the complaint, we reject the defendant's request for the imposition of sanctions against the plaintiff (see, CPLR 8303-a).

Accordingly, the order appealed from is affirmed.

BRACKEN, J.P., COPERTINO, and SANTUCCI, JJ., concur.

ORDERED that the order is affirmed, with costs.

ENTER:

Martin H. Brownstein
Clerk

ORDER APPEALED FROM, Dated February 7, 1991, filed February 13, 1991 (pp. A16-A17)

SHORT FORM ORDER

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No. 8264/90
R/D May 9, 1990

SUPREME COURT - STATE OF NEW YORK
I.A.S. PART VI SUFFOLK COUNTY

PRESENT:
Hon. LESTER E. GERALD MOTION DATE APRIL 30, 1990
JUSTICE MOTION NO. CASEDISP

ALLAN AND ALLAN ARTS LTD., d/b/a GATEWAY PLAYHOUSE,

Plaintiff,

-against-

GLORIA M. ROSENBLUM,

Defendant.

PLTF'S/PET'S ATTY:

NOWAK & POPE, ESQS.
P.O. Box 1290
Deerfield Green
Water Mill,
NY 11976

DEFT'S/RESP'S ATTY:

GLORIA M. ROSENBLUM, PRO SE
192 West Main St.
East Islip, NY
11730

Upon the following papers numbered 1 to 19 read on this motion to dismiss Notice of Motion/Order to Show Cause and supporting papers 1-14; Notice of Cross Motion and

supporting papers ___; Answering Affidavits and supporting papers 15 Replying Affidavits and supporting papers 16; Other 17-19 it is,

ORDERED that this motion by plaintiff to dismiss this action for slander and libel because it fails to state a cause of action is considered under CPLR 3211 subd. (a) (7) and is granted.

In this action, plaintiff claims to have been damaged in its personal and business reputation because of statements concerning plaintiff's exploitation of the issue of handicapped parking for its own purposes which were made by the defendant at a hearing of the Village of Bellport Zoning Board.

Movant argues that the action must be dismissed because relevant statements made at a quasi-judicial proceeding are absolutely privileged and that the report of such proceeding is also privileged pursuant

to Civil Rights Law Section 74.

Plaintiff counters that statements made during hearings before a zoning board of appeals are not absolutely privileged and that even if such statements were privileged, defendant as a voluntary participant does not qualify.

It is clear that the Rockland County Supreme Court in 1952 found that the absolute privilege which attaches to statements made in a judicial and quasi-judicial proceeding does not apply to a proceeding before a zoning board of appeals. Elish v. Goldman, 117 N.Y.S.2d 867. However, this case stands alone in marked contrast to numerous cases in which the absolute privilege has been applied to administrative hearings including: the State Division of Human Rights (Silver v. Mohasco Corp., 94 A.D.2d 820, 462 N.Y.S.2d 917); Workers' Compensation Board (Lipton v. Freedman, 2 Misc.2d 165, 152 N.Y.S.2d 261);

and the New York State Division of Housing and Community Renewal (Park Knoll Associates V. Schmidt, 59 N.Y.2d 205, 464 N.Y.S.2d 424).

In a broader context, a zoning board of appeals is considered to be a quasi-judicial body. Moundroukas v. Foley, 90 A.D.2d 784, 472 N.Y.S.2d 33. The public policy consideration behind the absolute privilege, which is to encourage the free expression of true information relevant to the public interest applies to a zoning board hearing where determinations as to land usage are made on the basis of public health, safety and welfare.

In contract to the Rockland Supreme Court, this Court finds that a zoning board of appeals is a quasi-judicial body in which the public policy requires the application of an absolute privilege. This Court finds further that although defendant was a voluntary participant at the hearing, she

was an adjacent landowner who would be directly affected by the outcome of the proceeding and who would be entitled to intervene in any judicial appeal pursuant to Article 78. Accordingly, she enjoys sufficient status to warrant the application of the privilege. Park Knoll Associates v. schmidt, Supra.

The complaint is dismissed.

Dated: February 7, 1991 _____
J.S.C

Supreme Court, U.S.
FILED
SEP 6 1995
CLERK

No. 95-221

In The

Supreme Court of the United States

October Term, 1995

ALLAN AND ALLAN ARTS, LTD.,

Petitioner,

vs.

GLORIA ROSENBLUM,

Respondent.

On Petition for a Writ of Certiorari to the Court of Appeals, State of New York

RESPONDENT'S BRIEF IN OPPOSITION

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7372
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26pp

QUESTIONS PRESENTED

1. Should Petitioner's writ of certiorari be granted when the only issue is whether it was appropriate for a state court to grant absolute privilege, instead of a qualified privilege, to relevant statements made by an adjoining landowner opposing Petitioner's application for a zoning variance before a Village Zoning Board of Appeals?

2. Is the question of whether a state court incorrectly applied an absolute privilege instead of a qualified privilege to relevant statements made during a quasi-judicial hearing a federal issue?

3. Do the First and Fourteenth Amendments provide protection to a corporation spoken about or to the person who does the speaking.

4. Is a state abridging a corporation's First and Fourteenth Amendment rights when it grants immunity to a person who exercised her right of free speech by making relevant statements opposing the corporation's application to a municipal board during a public hearing in which public participation is requested?

5. Should damages be awarded under the Court's Rule 42.2, when the petition is frivolous and it represents the continuation of what the state's appellate court recognized as a SLAPP — Strategic Lawsuit Against Public Participation — suit, which is designed to punish a person for opposing an application to a municipal board and intended to discourage and intimidate others from doing so?

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I

OPINIONS BELOW

All the courts below have denied Petitioner's request for relief and Petitioner has exercised its rights to appeal to all the available state courts.

The history of this dispute dates to 1990, when Petitioner sued Respondent, alleging that statements made by Respondent at a municipal zoning hearing were defamatory. Petitioner, a New York corporation, commenced the action in the New York State Supreme Court (hereinafter "trial court"). (A29). The trial court granted Respondent's motion to dismiss Petitioner's complaint for failure to state a cause of action, on the ground that relevant statements made by Respondent, an adjoining landowner, at a judicial hearing conducted by a Village Zoning Board of Appeals (hereinafter "Zoning Board of Appeals") against Petitioner's application for a zoning variance are entitled to absolute privilege. (A29-30). Petitioner claimed, in the courts below and now to this Court, that a qualified privilege not an absolute privilege should have been applied. (Petitioner's Brief, pp. 17-34).

The New York State Supreme Court, Appellate Division, Second Department (hereinafter "Appellate Division"), denied Petitioner's appeal in a unanimous decision, on the same ground as the trial court. (A6).

In its opinion, the Appellate Division pointed out that Petitioner's action was a SLAPP ("Strategic Lawsuit Against Public Participation") suit, that is, a lawsuit designed to punish a person or entity for opposing an application to a municipal board and intended to discourage and/or intimidate others from doing so. (A25).

Petitioner's application to the Appellate Division for

reargument and for leave to appeal to the New York State Court of Appeals was also denied. (A2-3). Thereafter, Petitioner applied to the Court of Appeals for leave to appeal to it, which was denied. (A7). This exhausted all of Petitioner's appeals in state courts.

STATEMENT OF JURISDICTION

Petitioner sets forth absolutely no legal authority to support jurisdiction.

Respondent respectfully submits that this Court does not have jurisdiction to review the order in question by writ of certiorari, because the only question presented by the Petitioner is strictly a state issue. (Petitioner's Brief, pp. i & 20). It does not concern conflicting decisions of the United States courts of appeal or another state's court of last resort, nor does it bring into question the validity of a treaty or statute of the United States or the validity of a statute of any state on the ground of it being repugnant to the Constitution, treaty or laws of the United States.

Although Petitioner claims a right under the First and Fourteenth Amendment of the Constitution of the United States, that right belongs to Respondent, who made the utterances, and not the Petitioner. The Petitioner did not raise a constitutional issue in the courts below. (Petitioner's Brief, p. 9).

Nor does Petitioner's issue of whether the New York courts should have applied a qualified, instead of absolute, privilege to statements have any federal precedential value. In addition, a state court is the final arbiter of its own laws and is free to define immunity defenses, such as absolute privilege, that broaden, not restrict, free speech.

STATEMENT OF THE CASE

A. Facts

Petitioner operates a theater business on property in a residentially zoned area, located immediately adjacent to Respondent's home, by virtue of a variance granted in 1962 by the Zoning Board of Appeals of the Village of Bellport, the municipality in which both are located.

In 1989, Petitioner filed an application to the Zoning Board of Appeals seeking additional variances to expand its commercial use. At the public hearing held by the Zoning Board of Appeals on Petitioner's application, Respondent and other residents spoke in opposition to Petitioner's application. The Zoning Board of Appeals rejected in part Petitioner's application. (A5-7).

In 1990, Petitioner commenced a libel and slander action against Respondent seeking eight million dollars in damages, based solely on her comments made at the Zoning Board of Appeals hearing. (A9, 29).

The only allegations of slander set forth in Petitioner's complaint (part or original record below) are based on the following statements Respondent made to the Zoning Board of Appeals:

> FIFTH: What I am against is anyone that uses a false concern for the handicapped as a cynical means of justifying illegal activity.
>
> * * *
>
> SIXTH: In the later years, 70's and early 80's, Petitioner had the area roped off during

the theater season, and did not use the side yards for parking . . .

* * *

SEVENTH: Petitioner is serious about handicapped parking? This is something that I mentioned earlier, And (sic) the answer is a very clear no. There are several reasons that I believe that the designation of this areas as so-called, quote, "handicapped parking", is a cynical manipulation by Petitioner in an attempt to legalize its long term illegal conduct.

* * *

EIGHTH: . . . no effort is made to enforce handicapped only parking.

* * *

NINTH: Now, the next point is the area is completely unsuitable for handicapped parking. . . . There are no ramps or walkways leading to the theater entrance.

* * *

TENTH: Petitioner's so-called concern for the handicapped has not extended to even the most basic accessibility improvements. Not only has the Petitioner located this so-called handicapped parking areas in an unsuitable and even dangerous place, but their so-called

concern has not translated any other basic modifications, such as accessible rest rooms, reserved seating for persons who use wheelchairs, appropriate ramps, drinking fountains or telephones.

In conclusion, Petitioner has a long history of broken promises dating back many years. It has continued to violate the law, maintain the illegal storage, parking, noise and illegal year-round activity, despite years of warnings. In fact, the only reasons Petitioner even went to the trouble of making this application was that it was threatened with a refusal to allow it to open for the season. I believe that 39 years is more than enough opportunity for Petitioner to clean up its act. Petitioner continues to show its contempt for village officials by maintaining the illegal activity even while it makes this application.

ELEVENTH: Everybody keeps referring to storage of trucks. I want to point out we are not talking about storage of empty trucks, we are talking using of trucks, storing them there and using them to store materials and scenery. I am mindful of the fact that what happened to Grucci's, that when the trucks used at that plant didn't have proper safety and building and fire alarms and whatever else is necessary went up in an explosion, these trucks were also used for storage illegally, so even separate and a part from storing of these vehicles they have no legal right to use trucks to store anything.

The sole allegation in Petitioner's complaint of the essential element of publication necessary to establish libel was that the oral statements quoted above "were published in an official transcript [of the public hearing] available to the public and members of the community." (part of the original record below). The transcript was prepared by a stenographer hired by Petitioner. (A7, 9).

REASONS FOR DENYING THE WRIT

I.

THIS IS A SLAPP SUIT.

In its unanimous decision affirming the trial court's dismissal of Petitioner's complaint, the Appellate Division noted that this a SLAPP suit — Strategic Lawsuit Against Public Participation. (A25). The court in *Gordon v. Marrone,* 590 N.Y.S. 2d 649 at 656 (Sup. Ct. Westchester County, 1992) described SLAPP suits and their effects:

> **SLAPP suits function by forcing the target into the judicial arena where the SLAPP filer foists upon the target the expenses of a defense. The longer the litigation can be stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success. The purpose of such gamesmanship ranges from simple retribution for past activism to discouraging future activism. Needless to say, an ultimate disposition in favor of the target often amounts merely to a pyrrhic victory. Those who lack the financial**

> **resources and emotional stamina to play out the "game" face the difficult choice of defaulting despite meritorious defenses or being brought to their knees to settle. The ripple effect of such suits in our society is enormous. Persons who have been outspoken on issues of public importance targeted in such suits or who have witnessed such suit will often choose in the future to stay silent. Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined.** (Emphasis supplied)

There is no federal jurisdiction for this frivolous appeal. Petitioner merely alleges that its First and Fourteenth Amendment rights have been violated, but provides absolutely no legal authority to establish that its free speech rights have been violated and that this Court has jurisdiction. It is just a continuation of Petitioner's SLAPP suit where the merits or victory of the litigant is not the main purpose. The longer this litigation is "stretched out, the more litigation that can be churned, the greater the expense that is inflicted and the closer the SLAPP filer moves to success." *Gordon v. Marrone, supra.*

The Petitioner commenced this action in 1990, before New York State passed Civil Rights Law, Sections 70-a & 76-a. These statutes give some protection to the targets, like Respondent, of these types of lawsuits. (A25). But, because the SLAPP suit legislation did not become effective until January 1, 1993, after the instant action was commenced, it gives Respondent no protection. (A25). New York State's SLAPP suit legislation was passed "to protect a citizen who is subjected to a SLAPP (Strategic Lawsuits Against Public Participation)" suit arising

out of his or her exercising his or her right of public petition and/or participation. The legislative findings and purpose, as stated in the law, are:

> The legislature further finds that the threat of personal damages and litigation costs can be and has been used as a means of harassing, intimidating or punishing individuals, unincorporated associations, not-for-profit corporations and others who have involved themselves in public affairs . . .

(A25).

In Suffolk County, New York, where this action originated, the bringing of SLAPP suits by businesses and developers became so offensive that as early as 1985, the Suffolk County Legislature adopted a local law authorizing the formation of a "Citizen's Legal Defense Fund", Resolution 1156-1985 (S18-19). This local law sets forth its "Legislative Intent":

> . . . that certain builders, landowners and developers appearing before municipal boards, agencies, commissions and authorities who or which *have applied for . . . entitlement for use or permission to act from a municipality . . . or board have recently resorted to the use of lawsuits to intimidate, harass, disrupt or silence civic associations . . . citizens and individuals from asserting personal viewpoints in connection with such matters.*

(Emphasis supplied)

This local law also sets up a mechanism for individuals suddenly faced with the crushing burden of defending the

exercise of their free speech rights by allowing civic associations and individuals who are sued for speaking out at public meetings to obtain funding for their defense. However, the mechanism established by the law has never received any funding from the county.

Unfortunately, neither the state court decisions nor the state and county legislation have made an impact on Petitioner, who has not stopped pursuing this harassing meritless litigation up through and including this Court.

II.

FIRST AND FOURTEENTH AMENDMENT RIGHTS BELONG TO RESPONDENT, NOT PETITIONER.

Petitioner claims in its petition that its First Amendment right of free speech has been violated by the New York courts conferring absolute privilege on relevant statements made at quasi-judicial proceedings without providing any legal authority for its position. (Petitioner's Brief, pp. 10-16). Yet, "[S]hort of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined" than the intimidation by a SLAPP suit against a person who is speaking and exercising his/her right of petition and participation. This First Amendment right is not intended for the benefit of the person or entity spoken about. *Gordon v. Marrone, supra.*

The Appellate Division in this case wrote that the application of absolute privilege to Zoning Board of Appeals hearings advances an important public policy:

> *. . . by affording an absolute privilege to material and pertinent statements made by the*

> *participants in proceedings before a Zoning Board of Appeals proceeding, we are also advancing the important public policy of encouraging the active participation* of the citizenry in issues affecting the welfare of the community. (Emphasis Supplied)

(A24-25).

Petitioner's argument that the New York courts acted in violation of its First and Fourteenth Amendments' right of free speech is in direct conflict with the rationale of the granting of absolute privilege, which is the *expansion* of free speech:

> The interest of society requires that whenever [persons] seek the aid of courts of justice, either to assert or to defend rights of person, property, [or] liberty, speech and writing therein must be untrammeled and free. *The good of all must prevail over the incidental harm to the individual.* So the law offers a shield to the one who in legal proceedings publishes a libel, not because it wishes to encourage libel, but because *if [persons] were afraid to set forth their rights in legal proceedings for fear of liability to libel suits, greater harm would result, in the suppression of the truth. The law gives to all who take part in judicial proceedings, judge, attorney, counsel, printer, witness, litigant, a right to speak and to write,* subject only to one limitation, that what is said or written bears upon the subject of litigation. [Citations Omitted]

(Emphasis Supplied) (A10-11).

Almost every case that discusses absolute privilege sets forth this same rationale.

Petitioner now argues that it was "denied equal protection of a first amendment right as a result of their [New York courts] application [of absolute privilege] to a Zoning Board of Appeals for a variance from municipal zoning regulations." (Petitioner's Brief, p. 13). Petitioner believes "that protecting the public's right to free speech is a compelling state interest." But Petitioner says that "so, too, is the right of citizens", like Petitioner, as an applicant to a Municipal Board, "to freely participate in the public process without the fear of being harassed, intimidated or punished with costly and baseless litigation by those who seek to silence them." (Petitioner's Brief, p. 14). However, it was Petitioner who commenced and continued this action through every single court it could petition.

Respondent did not seek to silence Petitioner; she merely sought to present her views on Petitioner's application for a zoning variance. She did so by exercising her right of free speech, by addressing the appropriate board at a public hearing convened to consider Petitioner's application and at which public participation was requested.

It is Petitioner's free speech rights that are protected by the First and Fourteenth Amendments. A corporation has no constitutional right, as argued by Petitioner, to prevent or punish those who make relevant statements about it to a Zoning Board of Appeals at a public hearing on the corporation's application for a zoning variance. (Petitioner's Brief, p. 16). Nor does Petitioner provide one citation that supports its position. It just espouses rhetoric and tortured reasoning — characteristic of frivolous and harassing SLAPP suits.

Petitioner has everything in reverse. Petitioner is asking this

Court to look at the right to the constitutional protection from the point of view of the person about whom or the entity concerning which the comments are made and not from the point of view of the speaker, who is exercising his/her right of free speech, which is what the First and Fourteenth Amendments are protecting. In addition, Petitioner is seeking a decision from this Court that would *restrict* a person's free speech rights by denying the right of the state court to confer absolute privilege on a person who makes relevant statements at a quasi-judicial hearing.

Petitioner was not a speaker; the utterances and, therefore, the First Amendment rights belongs to Petitioner.

III.

PETITIONER'S ARGUMENT THAT THE STATE COURTS SHOULD HAVE APPLIED A QUALIFIED, NOT AN ABSOLUTE, PRIVILEGE TO STATEMENTS MADE AT A VILLAGE ZONING BOARD HEARING IS NOT A FEDERAL ISSUE.

In Point III of its brief, Petitioner states that if the New York courts granted a qualified privilege and not an absolute privilege to Respondent's statements, then it would not have "deprived Petitioner of its right not to be defamed." (Petitioner's Brief, pp. 18-21).

This is not a federal question. Nor does Petitioner cite any authority to support its position that this is a federal question. This is strictly a state issue, because the states are the final arbiters of their own laws. *Herb v. Pitcarin*, 324 U.S. 117, 89 L. Ed. 789, 65 S. Ct. 459 (1945); *Wolf v. Weinstein*, 372 U.S. 633, 10 L. Ed. 2d 33, 83 S. Ct. 969 (1963); *Archie v. City of Racine*, 847 F.2d 1211 (7th Cir., 1987), *cert. denied*, 489 U.S. 1065, 103 L. Ed. 2d 809, 109 S. Ct. 1338 (1989).

In addition, the states have a right to impose immunity defenses. *Martinez v. California*, 444 U.S. 277, 62 L. Ed. 2d 481, 100 S. Ct. 553 (1980). The states have broad powers to control tort liability as long as they are not arbitrary. In *Ferri v. Ackerman*, 444 U.S. 193, 62 L. Ed. 2d 355, 100 S. Ct. 402 (1979), the Supreme Court stated that where state law creates a cause of action, it is free to define immunity defenses unless they are in conflict with the Federal Constitution. *See also, Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 41 L. Ed. 2d 789, 94 S. Ct. 2997 (1974).

Most of Petitioner's brief consists of its argument that the New York courts should have applied a qualified privilege and not an absolute privilege to Respondent's statements. Its position is summed up by the following:

> . . . it was not "necessary" for New York to grant an absolute privilege to statements made by a voluntary participant in a Zoning Board of Appeals hearing because a qualified privilege would have accomplished the purpose for which the absolute privilege was intended — to protect speakers from fear of speaking their minds and also encouraging the citizenry to participate in matters of public interest — while at the same time not discriminating against an applicant. Thus, New York's action was not "necessary" to further a "compelling" state interest.

(Appellant's Brief, pp. 34-35).

Petitioner agrees with the principle of absolute privilege, but claims that it should not apply it to a quasi-judicial proceeding. Even the cases of other states cited by Petitioner also apply absolute privilege when the statement is made in a quasi-judicial proceeding. (Appellant's Brief, pp. 25 & 30).

Each of the fifty states has complex immunity rules. *See* Friesen, *State Constitutional Law*, Section 8.01. States do vary on the standards they use to determine which proceedings are quasi-judicial and how each applies their standard.

Petitioner incorrectly states that the "New York courts have not articulated a necessary reason" for the application of absolute privilege to zoning boards of appeals. (Petitioner's Brief, p. 19). New York courts have established a stringent standard to determine whether a proceeding is a quasi-judicial one and when to apply absolute privilege. In 17 pages of its decision, the Appellate Division discusses the cases that applied this standard to zoning board of appeals hearings in New York State and notes the long history and the important public purpose of applying absolute privilege to comments made in quasi-judicial hearings. (A9-26).

The application of absolute privilege to protect free speech is over 100 years old. Since the "mid-19th century", the New York courts have applied absolute privilege to communications made in the course of a judicial proceeding so that it could not form the basis of a defamation action. *Park Knoll Associates v. Schmidt*, 89 A.D. 2d 164, 454 N.Y.S. 2d 901 (2nd Dept. 1982), *rev'd*, 59 N.Y. 2d 205, 464 N.Y.S. 2d 424, 451 N.E. 2d 182, *on remand*, 99 A.D. 2d 772, 472 N.Y.S. 2d 19.

The rationale for this immunity is that:

> The interest of society requires that whenever men seek the aid of courts of justice, either to assert or to defend rights of person, property (or) liberty, speech or writing therein must be untrammeled and free. The good of all must prevail over the incidental harm to the individual. So the law

> offers a shield to the one who in legal proceedings publishes a libel, not because it wishes to encourage libel, but because *if men were afraid to set forth their rights in legal proceedings for fear of liability to libel suits, greater harm would result, in the suppression of the truth.* The law gives to all who take part in judicial proceedings, judge, attorney, counsel, printer, witness, litigant, a right to speak and to write, subject only to one limitation, that what is said or written bears upon the subject of litigation.

Seelman, *The Law of Libel and Slander in New York*, (rev. ed.), p. 223, quoted in *Park Knoll Associates v. Schmidt, supra,* 454 N.Y.S. 2d at 905. (Emphasis supplied.)

Because it was determined that the rationale for absolute privilege exists with equal force for quasi-judicial proceedings, *Moundroukas v. Foley,* 90 A.D. 2d 784, 472 N.Y.S. 2d 32 (2nd Dept. 1984), New York courts have consistently recognized that absolute privilege attaches equally to communications made in administrative proceedings which in substance exhibit quasi-judicial attributes. *Park Knoll Associates v. Schmidt, supra,* 454 N.Y.S. 2d at 905; *Studley v. LeFrak,* 50 A.D. 2d 162, 376 N.Y.S. 2d 200, 204, (2nd Dept. 1975), *aff'd insofar as appealed from*, 41 N.Y. 2d 881, 393 N.Y.S. 2d 980, 362 N.E. 2d 611.

The evolution of the application of absolute privilege to quasi-judicial proceedings in New York *started about 40 years ago. Park Knoll Associates v. Schmidt,* 454 N.Y.S. 2d 901, 89 A.D. 2d 164, *rev'd*, 464 N.Y.S. 424, 59 N.Y. 2d 205, 451 N.E. 2d 182, *on remand*, 472 N.Y.S. 2d 19, 99 A.D. 2d 772.

In *Moundroukas v. Foley, supra,* the Appellate Division

described the public policy rationale for applying absolute immunity to municipal zoning board of appeals:

> . . . public policy consideration behind the absolute privilege, which is to *encourage the free expression* of true information relevant to the public interest, applies to the zoning board hearing where determinations as to land usage is made on the basis of public health, safety and welfare. (Emphasis Supplied).

To the same effect is *Jensen v. Zoning Board,* 130 A.D. 2d 549, 515 N.Y.S. 2d 283 (2nd Dept. 1987), *app. denied,* 70 N.Y. 2d 611, 523 N.Y.S. 2d 495, 518 N.E. 2d 6; *Toker v. Pollak,* 44 N.Y. 2d 211, 222, 405 N.Y.S. 2d 1, 376 N.E. 2d 163 (1978); *Kitchner v. State of New York,* 82 Misc. 2d 858, 371 N.Y.S. 2d 91 (1975); *see also,* Village Law, Section 7-710; Carmody-Wait on New York Practice Vol. 22, pp. 130-131; Anderson, *Zoning*, Section 25.25, pocketpart p. 76.

The law on absolute privilege and the rationale for applying it to quasi-judicial proceedings has been clearly established for years by a long line of cases in New York and other states. It is supported by the compelling public interest that persons should be able to "speak freely . . . insulated from harassment and fear of financial hazard." *Park Knoll Associates v. Schmidt, supra,* 424 N.Y.S. 2d at 426.

As in most SLAPP suits, if there was an ultimate disposition in favor of Petitioner, it would amount "merely to a pyrrhic victory". *Gordon v. Marrone, supra.* Even if Petitioner was correct and Respondent's statements were only entitled to a qualified privilege, Petitioner's action would fail anyway for several reasons.

With a qualified privilege, speech is protected if it was not spoken maliciously. Under New York law, as an adjoining landowner directly impacted by Petitioner's application for use variances permitting it to expand its commercial use, it could never be disproved that at least one of Respondent's motivating factors for speaking out was to protect her property from what Respondent perceived to be potential detrimental effects of the proposed variances. Since Petitioner could never prove that maliciousness was the *sole* motivating factor, her statements were also protected under the theory of qualified privilege. (A31-32). *See, e.g., SRW Associates v. Bellport Beach Property Owners,* 129 A.D. 2d 328, 517 N.Y.S. 2d 741 (2nd Dept. 1987), which held that statements by property owners opposing a cluster zoning application was not malicious, because "at least part of the defendants' motivation was to protect their neighborhood from what they perceived to be potential detrimental effects of the plaintiff's proposed development. As such, maliciousness was not the sole motivating factor. . . ."

Therefore, by applying a qualified privilege instead of an absolute privilege, Petitioner's sole benefit is that the litigation would have been extended and have been more expensive and time consuming to Respondent with discovery and a trial on the issue of maliciousness, but it would not have led to victory for Petitioner.

One only has to look at the statements Petitioner alleges is defamatory (pages 3-7 herein), to see, putting aside such defenses including truth and opinion, that if Petitioner was ultimately successful, the amount of damages would be minuscule at best.

Why then would Petitioner spend thousands of dollars in bringing a meritless action then continue it through to the last possible court? The answer lies in the root of SLAPP suits.

First, the litigation harassed and financially injured Respondent for having the temerity to oppose Petitioner in the past as well as at the Zoning Board of Appeals hearing. For the five years this action has been in existence, this eight-million dollar action has affected Respondent's credit rating. In addition, Respondent has been subjected to public embarrassment and injury from the publicity sought and obtained by Petitioner about this lawsuit, including allegations and inferences that Respondent opposes handicapped parking [a position discredited by the Appellate Division (A7)], yet clearly implied even in Petitioner's petition to this Court [which incidentally sets forth "facts" which are not in the trial court's record. (Petitioner's Brief, pp. 6)].

> . . . [r]umors are effective even if they are later disproved and retracted; *the damage is done by their mere existence, because most people assume "where there's smoke, there's fire".*

You Just Don't Understand, by Dr. Deborah Tannen (1990), page 106. (Emphasis supplied.)

Thus, litigation and its continuance is Petitioner's retribution against Respondent.

Second, this lawsuit had the added benefit to Petitioner of intimidating others from exercising their rights to speak out against Petitioner's business and any of Petitioner's future application to municipal boards. (Since this action was commenced, Petitioner has made other applications to the Village of Bellport; one is presently pending.)

This Court need only imagine the impact on Respondent's neighbors, the ones who spoke out as well as the ones who did

not, against Petitioner's application at the Zoning Board of Appeals, who may want to speak out on Petitioner's future applications, when they learned of this eight-million dollar lawsuit and that it has continued through for five years, three state courts and then to the United States Supreme Court. Who would dare oppose Petitioner again? Persons who have witnessed SLAPP suits "will often choose in the future to stay silent". *Gordon v. Marrowe, supra.* The cost, the emotional toll and the time spent to defend is enormous.

Third, Petitioner also received the economic benefit of the free publicity its business received in the press from the continuation of this litigation. It also gets to write off its litigation costs as a business expense. It has so far been a "no lose" situation for Petitioner, especially since sanctions, though well deserved, have yet to be imposed.

While Petitioner's issue has no federal precedential value, granting damages for this frivolous petition, pursuant to the Court's Rule 42.2, is an important precedent to establish, that will discourage similar frivolous retaliatory petitions, which represent nothing more than continuations of SLAPP suits.

CONCLUSION

The writ of certiorari should be denied and, pursuant to Rule 42.2 of this Court, damages should be imposed.

Respectfully submitted,

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